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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 9, 1997

VIA COURIER

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William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: *In the Matter of Rules and Policies on Foreign Participation in the U.S.
Telecommunications Market, IB Docket No. 97-142*

Dear Mr. Caton:

Enclosed for filing with the Commission is an original and nine (9) copies of the comments of FaciliCom International, L.L.C., in the above-referenced docket. These comments are also being provided to the Commission in electronic form on the enclosed diskette, in WordPerfect 5.1 format.

Please date-stamp the enclosed extra copy of these comments and return them in the envelope provided. Please do not hesitate to contact the undersigned if you require any additional information regarding these comments.

Very truly yours,

Maria L. Cattafesta

Margaret M. Charles
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Counsel for FaciliCom International, L.L.C.

Enclosures

cc: Douglas Klein, International Bureau
International Transcription Service

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20054

In the Matter of)

Rules and Policies on Foreign Participation)
in the U.S. Telecommunications Market)

IB Docket No. 97-142

**Comments of
FaciliCom International, L.L.C.**

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Dated: July 9, 1997

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**Comments of
FaciliCom International, L.L.C.**

I. Introduction

FaciliCom International, L.L.C., ("FCI") by its undersigned counsel, hereby submits these Comments in support of the Federal Communications Commission's ("Commission" or "FCC") proposal to conform its regulations to honor U.S. commitments in the landmark World Trade Organization Basic Telecom Agreement ("WTO Agreement").¹ Assuming that WTO Members honor their WTO commitments, competitive market forces will eliminate the need for the FCC to apply the effective competitive opportunities ("ECO") test as a tool to open foreign markets. FCI supports elimination of the ECO test for WTO countries that have signed the WTO Agreement because these countries will open their markets to U.S. carriers, and adopt regulations to ensure that U.S. carriers are not subject to unfair discrimination by their respective dominant carriers. To

¹ Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Order and Notice of Proposed Rulemaking*, IB Docket No. 97-142, FCC 97-195 (rel. June 4, 1997) ("*Notice*").

address the potential anticompetitive conduct of carriers from non-signatory WTO countries² and non-WTO countries, FCI advocates the FCC's use of existing and proposed regulatory safeguards such as conditional authorizations and dominant carrier regulation. FCI believes strongly that strategic safeguards rather than a strict application of the ECO analysis will provide the FCC with the flexibility to allow a global competitive market to develop and thrive in conformance with the public interest, while ensuring that U.S. carriers are not unfairly disadvantaged overseas.

II. Background

FCI is a rapidly emerging U.S. international facilities-based carrier authorized by the Commission to offer its customers a wide range of seamless domestic and international services. FCI's business plan is to become a premier, high-quality, cost-efficient, global telecommunications service provider. To that end, FCI recently acquired a foreign public telephone operator, Tele8, in Malmo, Sweden and the Swedish International Teleport, which provides INTELSAT Standard-B satellite coverage to the Indian Ocean Region. Moreover, FCI is a signatory to the Fiberoptic Link Around the Globe ("FLAG") project that will stretch an undersea fiber optic cable from Great Britain to Japan.

In an effort to expand its worldwide presence, FCI is currently applying for authorizations in several countries to provide domestic and international service, on a facilities and resale basis. In the United Kingdom, FCI was among the first to receive an International Facilities License and an International Simple Resale License and will soon provide service over an international gateway

² "Non-signatory WTO countries" are countries that are members of the WTO Agreement, but have not made commitments to liberalize their telecommunications markets under the WTO Agreement.

in London. Furthermore, FCI is currently applying for licenses in Hong Kong, Japan, Belgium, Australia, Finland, New Zealand, the Netherlands, Germany, France, Guatemala, and El Salvador. In light of FCI's nascent emergence as a key player in the global telecommunications market, the FCC's proposed foreign entry policy will have a profound impact on FCI's ability to realize its business objectives.

III. The WTO Agreement Will Unleash Market Forces that Will Eliminate the Need for the ECO Test.

FCI believes that in the post-WTO Agreement era, the ECO analysis is no longer the appropriate litmus test for foreign carrier entry into the U.S. market. Prior to the adoption of the WTO Agreement, the international telecommunications market began to transition "away from a model of correspondent national monopolies to a different model that includes multiple national carriers and a variety of international ventures."³ The FCC's concern that, under the new international model, foreign carriers may leverage their market power to the competitive disadvantage of U.S. carriers is on target. FCI concurs with the Commission that in the absence of the safeguards historically provided by the International Settlements Policy ("ISP"), monopoly carriers would likely favor their U.S. affiliates and whipsaw U.S. carriers.⁴ In light of the evolving global telecommunications market, the ECO test was a necessary tool to balance the tension between pro-competitive policies and possible anticompetitive behavior by foreign dominant carriers.

³ Market Entry and Regulation of Foreign-Affiliated Entities, *Report and Order*, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*), recon. pending, at ¶ 11.

⁴ See *id.* at ¶ 13.

If implemented, however, the WTO Agreement will fundamentally restructure the international telecommunications market. Under this agreement, 69 countries, representing 95 percent of global telecommunications revenues, entered into binding and enforceable commitments to allow foreign carriers to supply basic services in their markets.⁵ Many of these commitments include the obligation to adopt nondiscriminatory regulations and to enforce transparent interconnection regimes. Fifty-two of those countries, representing 90 percent of the telecommunications revenues in WTO Member countries, have granted market access for international services.⁶ The momentum of competitive forces in these countries will create significant pressure on other countries to liberalize their markets. As the WTO Agreement removes barriers to entry, numerous carriers like FCI will find greater opportunities to develop a worldwide presence. This activity will expand consumer choice and provide efficient, innovative service options at reduced rates that will benefit the public interest.

Given the likely profound impact of the WTO Agreement on the global market, FCI believes that the ECO test will no longer be an essential regulatory tool. Now that a vast majority of the industry will compete on a more level playing field, market forces rather than barriers to entry will provide significant protection against anticompetitive conduct. As the FCC has “repeatedly found . . . marketplace forces can replace regulation and make unnecessary burdensome regulatory requirements.”⁷ Elimination of the ECO test will eliminate the burden and growing cost of

⁵ Notice ¶ 28

⁶ *Id.*

⁷ *Foreign Carrier Entry Order* ¶ 9.

administrative delay on new players attempting to gain a foothold in foreign markets. The FCC's lengthy ECO evaluation process, which lasted approximately one year in the case of New Zealand,⁸ provides monopoly carriers with additional time to entrench themselves firmly in the market before the onslaught of competition. In the post-WTO world, this type of delay will not be conducive to the fast-paced telecommunications market that will demand quick and decisive action from its participants. Thus, elimination of a strict application of the ECO test will advance the public interest by reducing the barriers to entry and fostering competition.

IV. Regulatory Tools Will Protect U.S. Carriers From Anticompetitive Conduct.

Although market forces significantly reduce the potential for anticompetitive conduct, FCI believes that the Commission's existing and proposed regulatory framework is necessary to provide additional protection for U.S. carriers in the absence of the ECO test. The FCC's bifurcated approach to regulating foreign carriers before and after entry provides the FCC the flexibility to tailor its response to distinct scenarios and safeguards its overall mission to promote competition.

A. Pre-Entry Safeguards

1. Section 214 Authorizations

FCI concurs with the FCC that a rebuttable presumption in favor of granting a Section 214 application filed by a carrier from a WTO member country allows the FCC to bypass an unwarranted and unnecessary review of a country's regulatory policies. At the same time, this tool allows a

⁸ Telecom New Zealand Limited, Application for Authority under Section 214 of the Communications Act of 1934, as amended, to Acquire and Operate Facilities to Provide International Services Between the United States and New Zealand, *Order, Authorization and Certificate*, I-T-C-96-097, DA 96-2182 (rel. December 31, 1996) (*TNZL Order*). Telecom New Zealand Limited filed this application on February 6, 1996.

petitioner or the FCC to raise a red flag to address any concerns regarding potential discriminatory behavior. Although this favorable treatment would also apply to WTO members that have not entered into a binding commitment, FCI agrees emphatically with the Commission that the prospects for liberalization in these countries will be higher than in countries that are not WTO members. As the FCC correctly notes, WTO members are obligated to treat all WTO members similarly and are required to promulgate reasonable and objective domestic laws.⁹ Thus, a rebuttable presumption in favor of carriers from WTO member countries will strike the proper balance between regulatory efficiency and protection from potential anticompetitive behavior.

Contrary to the Commission's proposal, FCI opposes a strict application of the ECO test to countries that are not WTO members or to WTO member countries that have been challenged because the test's inflexibility will prevent the FCC from conducting a proper Section 214 evaluation. Because each country has its own unique approach to the telecommunications market based on its history and socio-economic development, the FCC cannot expect each country to mirror U.S. regulatory policies. Therefore, as an additional pre-entry safeguard, FCI urges the FCC to evaluate public interest factors that may or may not include ECO criteria depending on the country's market status.

For WTO countries that have been challenged and for non-WTO countries that have made significant progress towards liberalization, the FCC should weigh factors addressed in the FCC's existing public interest analysis. They include the existence of cost-oriented settlement rates in the destination market, the general significance of the proposed entry to the promotion of a competitive

⁹ Notice ¶ 22.

U.S. market, and any national security, law enforcement, foreign policy and trade concerns.¹⁰ These critical factors in combination with competitive pressures from other liberalized markets and the WTO Most Favored Nation nondiscrimination obligations provide ample protection with respect to these countries.

For non-WTO countries that have not made substantial progress toward liberalization, the FCC should consider additional public interest factors that include all, some or none of the ECO criteria such as the existence of cost allocation rules¹¹ and the existence of an independent regulator,¹² depending upon the special circumstances of that country. As an added pre-entry safeguard, FCI supports the Commission's continued use of conditional authorizations on any foreign-affiliated carrier where appropriate. Conditional authorizations also will provide the FCC the flexibility to tailor an authorization to the unique circumstances of the country and the carrier(s) involved. The FCC invoked this measure when, in light of Telecom New Zealand Limited's ("TNZL") affiliation with Bell Atlantic, it conditioned TNZL's Section 214 authorization on structural separation safeguards including separate recordkeeping requirements and joint ownership prohibitions.¹³ Conditional authorizations will also provide the carrier and the destination country incentives to make appropriate and reasonable adjustments. If those adjustments are not made within a reasonable time frame, the Commission can revoke the authorization.

¹⁰ *Foreign Carrier Entry Order* ¶ 62.

¹¹ *Id.* at ¶ 51.

¹² *Id.* at ¶ 54.

¹³ *TNZL Order* ¶ 49.

2. Alternative Settlement Arrangements

Similar to the context of Section 214 authorizations, the FCC's proposal to establish a rebuttable presumption in favor of alternative settlement arrangements of carriers from WTO countries maintains a proper equilibrium between regulatory efficiency and possible anticompetitive behavior. The FCC's *Flexibility Order* recognizes that "where competitive forces are emerging, the ISP's restraints on competition may be counterproductive."¹⁴ Assuming that WTO signatories honor their commitments and competitive forces fuel liberalization efforts, a rebuttable presumption in favor of WTO members will provide the FCC and other concerned parties ample opportunity to address potential discriminatory behavior.

For those arrangements involving carriers from non-WTO countries, FCI proposes that the FCC require U.S. carriers to demonstrate that deviation from the ISP will promote market-oriented pricing and will preclude abuse of market power by the foreign correspondent, standards already established in the *Flexibility Order*.¹⁵ Moreover, the *Flexibility Order*'s requirement that carriers affiliated with their foreign correspondent or involved in non-equity joint ventures file and make publicly available their alternative arrangements¹⁶ provides disclosure of the terms and conditions that indicate potential discriminatory conduct. In addition, the *Flexibility Order* requires carriers participating in alternative arrangements affecting more than twenty-five percent of the inbound or

¹⁴ Regulation of International Accounting Rates, *Phase II, Fourth Report and Order*, CC Docket No. 90-337, FCC 96-459 (Dec. 3, 1996) (*Flexibility Order*), recon. pending, ¶ 13.

¹⁵ *Id.* at ¶ 40.

¹⁶ *Id.* at ¶ 48.

outbound traffic on a particular route to file such arrangements.¹⁷ It also requires carriers to draft such arrangements to ensure that they do not contain any unreasonably discriminatory terms and conditions.¹⁸ These requirements provide an added layer of protection against anticompetitive conduct prior to regulatory approval. Furthermore, the Commission has the right to review all alternative arrangements, regardless of whether or not they trigger a safeguard, to ensure that they are consistent with the FCC's overall policy objectives.¹⁹ These pre-approval safeguards close any potential gaps in the FCC's regulatory framework to prevent discriminatory behavior.

B. Post-Entry Safeguards

1. Section 214 Authorizations

FCI concurs with the Commission that it has an arsenal of measures to deter, detect and sanction anticompetitive conduct following a foreign carrier's entry into the U.S. market. Dominant carrier regulation, which imposes additional reporting and recordkeeping requirements, specifically targets foreign-affiliated carriers with the "ability to act anticompetitively against unaffiliated U.S. carriers through the control of services or facilities on the foreign end."²⁰ For dominant carriers that do not face competition from multiple carriers, the FCC's proposal crafts additional safeguards, including restrictions on joint marketing agreements and the use of customer information.

¹⁷ *Id.* at ¶ 45.

¹⁸ *Id.*

¹⁹ *Id.* at 59.

²⁰ *Notice* ¶ 82.

Moreover, international traffic and revenue reports,²¹ the requirement to file operating agreements,²² and reporting requirements provide the FCC with the tools necessary to identify market distortions and anticompetitive trends. If the FCC detects discriminatory conduct, it can impose fines or forfeitures and ultimately revoke authorizations. These post-entry safeguards will provide ample protection as long as the FCC actively enforces them.

2. Alternative Settlement Arrangements

FCI believes that the *Flexibility Order* also provides the FCC with post-approval safeguards that significantly diminish the potential for anticompetitive conduct. The *Flexibility Order* requires that the Commission review periodically alternative arrangements in conjunction with foreign market conditions to ensure that competitive conditions continue to exist. In its evaluation, the FCC must compare each agreement not only with other similar agreements, but also with the prevailing benchmark accounting rates.²³ Moreover, the FCC's examination of the number of minutes of outbound and inbound traffic settled pursuant to an alternative arrangement reported in the carrier's international traffic and revenue report will allow it to monitor the operating results of alternative arrangements.²⁴ If the Commission determines that the agreement creates a significant net settlement payment imbalance, the FCC can consider appropriate action such as terminating the arrangement.²⁵ Consequently, the *Flexibility Order* provides the Commission with a number of

²¹ 47 C.F.R. § 43.61 (1996).

²² 47 C.F.R. § 43.51(a)-(d) (1996).

²³ *Flexibility Order* ¶ 60.

²⁴ *Id.* at ¶ 61.

²⁵ *Id.*

devices to detect and sanction anticompetitive conduct even after it approves an alternative settlement arrangement.

IV. Conclusion

Prior to the adoption of the WTO Agreement, the significant lack of competitive momentum necessitated the Commission's creation and strict application of the ECO test. Assuming that WTO members honor their commitments, the WTO Agreement will dramatically alter the landscape of the international telecommunications market. The WTO Agreement will open major telecommunications markets and create significant momentum that will pressure other markets to open their doors also. In light of these imminent changes, FCI believes that the ECO test is no longer applicable to the Commission's evaluation of carriers from both WTO Member countries and non-WTO Member countries that apply to participate in the U.S. market. Pre-entry and post-entry regulatory safeguards will provide ample protection from potential anticompetitive conduct.

Respectfully submitted,

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